

HONORABLE JUDGE MARSHA J. PECHMAN
MAGISTRATE JUDGE BRIAN A. TSUCHIDA

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

JOE J.W. ROBERTS, JR.,

Plaintiff,

v.

VILMA KHOUNPHIXAY, et al.,

Defendants.

NO. 2:18-cv-0746-MJP-BAT

DEFENDANTS' RESPONSE TO
PLAINTIFF'S THIRD MOTION
REQUESTING APPOINTMENT
OF COUNSEL

The Defendants, JACK WARNER, MYRON AYALA, HEATHER HELMS, VILMA KHOUNPHIXAY, LINDSAY MCINTYRE and JANA ROBISON by and through their attorneys, ROBERT W. FERGUSON, Attorney General, and AARON WILLIAMS, Assistant Attorney General, respectfully submit their Response to Plaintiff's Third Motion to Appoint Counsel. Dkt. 71.

I. RESPONSE

A. Mr. Roberts Has Failed to Show Exceptional Circumstances Necessary for the Appointment of Counsel

There is no right to appointed counsel in cases brought under 42 U.S.C. § 1983. The court may only request counsel to represent an indigent party in exceptional circumstances. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986); *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984); *see* 28 U.S.C. § 1915(e)(1). The court has further discussed the requirement of "exceptional circumstances" as follows:

1 A finding of exceptional circumstances requires an evaluation of both “the
2 likelihood of success on the merits [and] the ability of the plaintiff to articulate
3 his claims *pro se* in light of the complexity of the legal issues involved.”

4 *Wilborn*, 789 F.2d at 1331 (citations omitted).

5 Neither of the above-cited “factors is dispositive, and both must be viewed together
6 before reaching a decision.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991) (quoting
7 *Wilborn*, 789 F.2d at 1331).

8 Mr. Roberts has not demonstrated the existence of “exceptional circumstances” to
9 support his request for appointment of counsel because: (1) he is plainly capable of articulating
10 his claims *pro se*; (2) he has not demonstrated that his allegations involve any sort of complex
11 case; and (3) he has not demonstrated a likelihood of success on the merits.

12 First, Mr. Roberts has clearly shown an ability to articulate his claims in a clear fashion
13 to this Court. The pleadings on file in this case demonstrate Mr. Roberts is familiar with the court
14 rules as well as the law pertaining to his claims. He has been able to navigate not only the rules
15 but also to conduct legal research and to cite appropriate cases to support his arguments. *See*,
16 *inter alia*, Dkt. 71, at 7. He claims that he is not able to represent himself because he is unable
17 to access a law library. But this allegation is belied by the fact that he was clearly able to cite
18 cases in his Motion. Dkt. 71, at 7. Thus his own Motion proves that he is able to conduct legal
19 research. Mr. Roberts has failed to carry his burden to demonstrate an inability to present his
20 claims to this Court without counsel.

21 Second, this is not a complex case. This case does not involve complex facts, or law.
22 Rather, it involves the simple question of whether Defendants used excessive force in their
23 treatment of Mr. Roberts in light of his threats of self-harm and suicide. And for the same reason,
24 Mr. Roberts has failed to demonstrate a likelihood of success on the merits. This Court should
25 deny Mr. Roberts’s request for appointed counsel.
26

II. CONCLUSION

Mr. Roberts has failed to show he is entitled to appointment of counsel so Defendants respectfully request that the Court deny his Motion.

RESPECTFULLY SUBMITTED this 21st day of February, 2019.

ROBERT W. FERGUSON
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CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused to be electronically filed the foregoing DEFENDANTS' RESPONSE TO PLAINTIFF'S THIRD MOTION REQUESTING APPOINTMENT OF COUNSEL with the Clerk of the Court using the CM/ECF system which will send notification of the document to the following CM/ECF participants:

JOE JW ROBERTS DOC #394089
Washington Corrections Center
docwccinmatefederal@doc1.wa.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED this 21st day of February, 2019, at Olympia, Washington.

s/ Katrina Toal
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